



## 22 CFR Part 40

[Public Notice: 11566]

RIN 1400-AE87

### Visas: Ineligibility Based on Public Charge Grounds

**AGENCY:** State Department.

**ACTION:** Interim final rule; reopening of public comment period.

**SUMMARY:** On October 11, 2019, the Department of State (“the Department”) published an interim final rule (“IFR”) regarding visa ineligibility on public charge grounds and accepted public comments on the rule through November 12, 2019. Given the many changed circumstances since publication of the IFR, the Department is soliciting additional information from the public by reopening the public comment period for an additional 60 days.

**DATES:** The Department of State will accept comments until [INSERT DATE 60 DAYS FROM DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

**ADDRESSES:** To provide comments go to <https://www.regulations.gov>, enter Docket DOS-2021-0034 and RIN 1400-AE87. Alternatively, you may submit comments by any of the following methods:

- E-mail: You may submit comments via email to [VisaRegs@state.gov](mailto:VisaRegs@state.gov). You must include the RIN in the subject line of your message.
- Mail paper submissions: You may submit comments via physical mail to Regulatory Coordinator, Visa Services, Bureau of Consular Affairs, Department of State, 600 19<sup>th</sup> St, N.W., Washington, D.C. 20006. You must include the RIN in the Attention Line in the address.

**FOR FURTHER INFORMATION CONTACT:** Andrea B. Lage, Acting Regulatory Coordinator, Visa Services, Bureau of Consular Affairs, Department of State, 600 19<sup>th</sup> St, N.W., Washington, D.C. 20006, (202) 485-7586, [VisaRegs@state.gov](mailto:VisaRegs@state.gov).

## **SUPPLEMENTARY INFORMATION:**

### **I. Public Participation**

All interested parties are invited to respond to this Reopening of Public Comment Period by submitting written views and comments on the IFR regarding visa ineligibility on public charge grounds. Comments must be submitted in English or commenters must submit an English translation. Comments that will provide the most assistance to the Department in considering recommendations will reference a specific existing regulation, order, guidance, policy, or any other similar agency action, explain the reason for any recommended change, and include information that supports the recommended change.

### **II. Background**

On August 14, 2019, the Department of Homeland Security (“DHS”) issued a final rule outlining its new interpretation of the public charge ground of inadmissibility. *See Inadmissibility on Public Charge Grounds*, 84 FR 41292, as amended on October 2, 2019 by *Inadmissibility on Public Charge Grounds; Correction*, 84 FR 52357 (“DHS Public Charge Final Rule”). The Department issued an IFR on October 11, 2019, amending 22 CFR 40.41 by prescribing how consular officers determine whether a noncitizen is ineligible for a visa under section 212(a)(4) of the Immigration and Nationality Act (“INA”), 8 U.S.C. 1182(a)(4), and 6 U.S.C. 236(b), because they are likely at any time to become a public charge. *See Visas: Ineligibility Based on Public Charge Grounds*, 84 FR 54996.

The Department issued its IFR in significant part to ensure that consular officers were applying standards consistent with the DHS Public Charge Final Rule. Specifically, the IFR could have helped avoid situations where a consular officer evaluates a visa applicant’s circumstances and concludes that the applicant is not likely at any time to become a public charge, only for DHS to find the applicant inadmissible on public charge grounds under the same facts when they seek admission to the United States. *See, e.g.*, 84 FR at 55011 (“Coordination of Department and DHS implementation of the public charge inadmissibility ground is critical to

the Department’s interest in preventing inconsistent adjudication standards and different outcomes between determinations of visa eligibility and determinations of admissibility at a port of entry.”).<sup>1</sup>

In the time since the Department first issued the IFR, a court order vacating the DHS Public Charge Final Rule nationwide went into effect after the government moved to voluntarily dismiss an appeal of that order.<sup>2</sup> Due to the vacatur of the DHS Public Charge Final Rule, DHS immediately stopped applying its Public Charge Final Rule to all pending applications and petitions that would have been subject to that rule.<sup>3</sup> DHS is now implementing the public charge inadmissibility statute using the former-Immigration and Nationalization Service’s 1999 Interim Field Guidance on Deportability and Inadmissibility on Public Charge Grounds (64 FR 28689, May 26, 1999) issued by the former Immigration and Naturalization Service, which was in place before the 2019 DHS Public Charge Final Rule was implemented, for immigration petitions, applications for admission and adjustment of status. On August 23, 2021, DHS published an Advance Notice of Proposed Rulemaking (“ANPRM”) and notice of virtual public listening sessions to seek broad public feedback on the public charge ground of inadmissibility that will inform its development of a future regulatory proposal.<sup>4</sup>

### III. Change in Circumstances

With the vacatur of the 2019 DHS Public Charge Final Rule the original reason for the Department’s adoption of the 2019 IFR may no longer apply. Further, with the publication of the DHS ANPRM, DHS has indicated an intention to develop a new regulatory proposal that may substantively differ from the IFR.

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<sup>1</sup> The IFR is currently under a preliminary injunction issued by the Southern District of New York on July 29, 2020. *See Make the Road New York v. Pompeo*, 475 F. Supp. 3d 232 (S.D.N.Y. 2020).

<sup>2</sup> *Cook County v. Wolf*, 498 F. Supp. 3d 999 (N.D. Ill. 2020), appeal dismissed, 2021 WL 1608766 (7th Cir. Mar. 9, 2021).

<sup>3</sup> *See* USCIS, “Inadmissibility on Public Charge Grounds Final Rule: Litigation” <https://www.uscis.gov/green-card/green-card-processes-and-procedures/public-charge/inadmissibility-on-public-charge-grounds-final-rule-litigation> (last visited Aug. 24, 2021).

<sup>4</sup> *Public Charge Ground of Inadmissibility*, 86 FR 47025 (Aug. 23, 2021).

Additionally, just months after the Department issued its IFR, the COVID-19 pandemic swept the globe. The pandemic's ongoing effects on public health and economic conditions have been vast and have underscored the importance of ensuring that individuals are able to access public health and other programs for which they and their family members are eligible, without undue fear or confusion. The Department welcomes comments on the potential effects of the IFR on public health measures in response to the pandemic, as well as other ways that the Department should consider the intervening circumstances of the COVID-19 pandemic in relation to the IFR.

Consequently, the Department has concluded that it should review the IFR to determine (1) if the IFR should be rescinded or revised, and (2) what final rule should be adopted, if any. If the IFR is rescinded, § 40.41 would logically revert to its prior text pending any new rulemaking; such an outcome would likely be preferable to a regulatory void, which the Department did not propose in the 2019 IFR. *See* 22 CFR 40.41 (2018).<sup>5</sup>

#### IV. Request for Public Comment

The Department invites comment on any issues that may be pertinent to its review of the IFR to determine (1) if the IFR should be rescinded or revised, and (2) what final rule should be adopted, if any. Reopening the comment period gives interested persons an opportunity to comment on these issues.

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U.S. Department of State.*

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<sup>5</sup> Prior text of § 40.41 available at <https://www.govinfo.gov/content/pkg/CFR-2018-title22-vol1/pdf/CFR-2018-title22-vol1-chapI-subchapE.pdf>, page 8.